IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-175

CITY OF ST. LOUIS, a Municipal Corporation,
Petitioner,

v.

THOMAS W. GARLAND, INC., AND
MANLEY INVESTMENT COMPANY,
Respondents.

No. 79-206

MANLEY INVESTMENT COMPANY,
Petitioner,

v.

THOMAS W. GARLAND, INC., AND
THE CITY OF ST. LOUIS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

Thomas W. Garland, Inc., in Opposition

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JURISDICTION

Respondent Thomas W. Garland, Inc., does not question the jurisdiction as set forth in the Petitions.

QUESTIONS PRESENTED FOR REVIEW

Petitioner City of St. Louis misstates the nature of the legal issue sought to be reviewed. The issue is whether a cause of action lies against a municipal corporation under the Fifth and Fourteenth Amendments of the Constitution of the United States for a de facto taking of property without compensation where the municipal corporation commences an urban renewal project without following the proper legal procedures, which is terminated for lack of sufficient financing after the municipal corporation and its agents have taken steps to acquire property in the area and caused condemnation blight in the area, thereby rendering the property, a leasehold interest, worthless.

Petitioner Manley Investment Company misstates the nature of the legal issue sought to be reviewed. The issue is whether federal jurisdiction may be exercised over Defendant Manley as to a state law claim arising out of the same transaction as Plaintiff's claim against another party defendant, where Defendant Manley has an interest in the subject matter of the suit and the jurisdiction over the other party defendant is based upon the presence of a federal question under 28 U.S.C.A. § 1331.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those cited by both Petitioners, Respondent believes that the Fourteenth Amendment of the United States Constitution is also involved.

United States Constitution, Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

Respondent sets forth the salient facts of this case because of certain omissions, inaccuracies and misleading statements in the Petitions for Writs of Certiorari.

The Complaint in this case was filed on January 30, 1978. The facts are those set forth in the Complaint and the Amended Complaint and exhibits thereto. (Appendix D, E, Appendix Petition City of St. Louis) Two exhibits to the First Amended Complaint were omitted and are set forth herein as Appendix A and Appendix B.

On June 29, 1971, by Ordinance No. 55952 Defendant City of St. Louis blighted the entire downtown business area of the city, with only a few exceptions, pursuant to Section 29.020 Revised Code City of St. Louis, Missouri. On April 5, 1973, Defendant City of St. Louis passed an ordinance providing for a redevelopment contract with Mercantile Center Redevelopment Corporation for a six-block area in the business district. This area included the property occupied and used by Thomas W. Garland, Inc., under a 30-year lease, which would terminate December 4, 1982. Mercantile Center Redevelopment Corporation was to undertake a $150 million development in the six-block area. The Redevelopment Corporation had been organized on October 10, 1972, with a stated capital of $30,000. Manley Investment Company was organized as a corporation on May 10, 1972, with a stated capital of $30,000. Manley was used by Mercantile Center Redevelopment Corporation commencing in 1973 and 1974 to acquire property in City Blocks No. 118 and No. 119 for the redevelopment. On January 22, 1975, it acquired the fee interest in the property known and numbered as 410 North Sixth Street located in City Block No. 118. This property was purchased subject to the leasehold of Plaintiff Garland.

Buildings were torn down in the area of the Garland store; businesses were moved out; the remaining buildings in City Blocks No. 118 and No. 119, with the exception of the building in which was located the Garland store, are vacant and in some cases boarded up. Condemnation blight has taken over the area. These acts have destroyed the economic value of the Garland lease. Redevelopment of the area ceased because of a lack of financing to complete the project.

The City's passing of the ordinances and entering into the contract with the redevelopment corporation did not follow the requirements of the law in various ways. Specifically, it failed to require the commencement of condemnation proceedings within six months of the effective date of the ordinance authorizing the contract as required by its charter.

Plaintiff, relying on the ordinances, the representation of the Redeveloper that its property would be needed by September, 1974, and the public announcements, in 1973 and 1974 leased other property to replace its store, its administrative office, and its shipping-receiving department. Garland's constructed a new fur storage vault and moved its fur storage to that new vault. Garland's annually stores furs valued at about $1 million. All these undertakings were required to prevent a material disruption of the business and solely to provide facilities for the store and operating departments located in premises scheduled to be taken by September, 1974. Such action was not a normal method of operation and was done solely as a result of the redevelopment.

I

REASONS WHY THE PETITIONER CITY OF ST. LOUIS' PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

1. The Issues Presented Here Are Not Important Nationally

In this case we are dealing with a situation which arises simply because Defendant City did not follow the law and required procedures in carrying out an urban renewal program. If the City had required condemnation proceedings to be filed within six months as required by ordinance, and if it had required a detailed financial statement of the method of financing of the $150 million project by a $30,000 corporation before commencing the project, this case would not be here today. These failures, along with the failure of the City to require a performance bond under the contract as provided for therein, and to supervise performance and require compliance with the contract terms, have caused the conditions which gave rise to this litigation.

The awarding of damages for a de facto taking in redevelopment projects by federal courts in cases set forth on Page 10 and 11 of City's Petition is merely a recognition of situations where, either intentionally or unintentionally, cities have caused substantial depreciation of the value of property and caused damages to property owners in redevelopment areas for which no just compensation can be paid under the normal eminent domain laws. As alleged in the Petition, the date of taking in Missouri is the date the Commissioner's award is paid. In cases like this where redevelopment projects are delayed or terminated after partial performance, causing substantial depreciations of value of property and damages, the mischief done can only be corrected by application of this theory of recovery—a theory

recognized by this Court. *United States v. General Motors Corporation*, 323 U.S. 373 (1945); *United States v. Causby*, 328 U.S. 256 (1946).

The importance of this case nationally, if at all, is that cities are put on notice that they must comply with legal procedures in initiating and carrying out urban renewal projects, which seemingly have attracted speculators. What is presented in this case, since the legal theory is established, is simply a matter of evidence.

2. The Decision Does Not Conflict With the Decision of the Supreme Court

The Eighth Circuit Court of Appeals disagreed with the District Court, which had held that physical invasion or appropriation of property is essential to a de facto condemnation. It instead adopted as the law of the case the theory stated by this Court that some action short of acquisition or occupancy can constitute a de facto taking. Appendix B, Page A-11, Petition City of St. Louis.

3. The Eighth Circuit Court of Appeals' Decision in This Case Is Not Inconsistent With a Decision It Rendered Subsequently

The decision in *Ruby Young, Monroe Young, et al. v. Patricia Harris, et al.* (Appendix F, Petition City of St. Louis) merely determines that there was no proof of a federal project or use of federal funds involved and under the statute the relocation expenses could not be awarded. Plaintiff Garland sees nothing in the decision inconsistent with the legal theory or facts of this case.

II

REASONS WHY THE PETITION OF MANLEY INVESTMENT COMPANY FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

1. The Eighth Circuit's Decision Does Not Conflict With the Decisions of Other Courts of Appeal

The Petition of Manley contends that there is "irrefutable division" among the Courts of Appeal on the "pendent party" question (p. 6). However, even if Manley's Petition were granted, the resultant decision would almost certainly do nothing to resolve the supposed division.

To support its assertion of division among the Courts of Appeal, Manley has treated all pendent party cases as if the legal issues were the same in each. The distinction between different types of cases, such as between cases where federal jurisdiction is based on 28 U.S.C. § 1331 (federal question jurisdiction) and those where it is based on 28 U.S.C. § 1332 (diversity jurisdiction), is vitally important. As one writer has said:

> ". . . Federal question jurisdiction is defined by reference to the type of legal claim created by a particular factual pattern. Jurisdiction arises by virtue of that factual pattern and so should be limited by factual parameters. Diversity jurisdiction, on the other hand, is predicated upon the identity of the parties and their alignment. This suggests that the restrictive principle in diversity cases should be the identity of the parties, not the factual pattern, and that courts should hesitate to accommodate those claims or parties which cast doubt upon compliance with the diversity prerequisites." (92 Harv. L.R. 57, p. 249)

If this distinction between the basic principle underlying federal question jurisdiction and that underlying diversity jurisdiction is borne in mind, it is quite obvious that the argument in favor of exercising federal jurisdiction over pendent parties is far stronger in federal question cases than in diversity cases. As Wright, Miller and Cooper stated in their treatise, *Federal Practice & Procedure:*

> "The consideration for allowing 'pendent parties' in a federal question case may well be more compelling than for doing so when the only effect is to broaden the scope—and attractiveness—of diversity jurisdiction." (Wright, Miller & Cooper, 13A *Federal Practice & Procedure,* 462)

Because Garland's claims against Manley involve precisely the same facts as its claims against the City, which facts give rise to federal question jurisdiction, this is the ideal case for federal jurisdiction to be asserted over the pendent party.

The importance of the specific statutory provision on which federal jurisdiction is based was emphasized by this Court in *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365 (1978). None of the five cases cited by Manley as holding that pendent jurisdiction does not encompass pendent parties involved assertions of federal jurisdiction under 28 U.S.C. § 1331. Two of the cases so cited by Manley were brought under 28 U.S.C. § 1343(3) and were fully addressed by this Court in *Aldinger v. Howard,* 427 U.S. 1 (1976). Two others cited by Manley were brought under 28 U.S.C. § 1346(b). The fifth was brought under 28 U.S.C. § 1332, federal diversity jurisdiction.

It is obvious that the division among the Courts of Appeal referred to by Manley is more illusory than real. However, even if the division were real, the issues raised in the other cases bear no resemblance to those in this case. A grant of Manley's Petition would not serve to settle any division, whether real or imagined.

2. The Eighth Circuit Court of Appeals' Decision Is Not in Conflict With Applicable Decisions of This Court

Manley's Petition places great emphasis on three decisions of this Court to support its contention that the decision of the Eighth Circuit Court of Appeals is inconsistent with decisions from this Court. A careful examination of those three cases reveals that the Court of Appeals' decision is entirely consistent with them.

At Page 9 Manley's Petition asserts that the case of *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966) "does not require, or even suggest, a departure from the pre-existing rule that pendent jurisdiction pertained only to pendent claims and not to pendent parties". This assertion is directly contrary to this Court's statement in *Gibbs* at 383 U.S. 724 that "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; *joinder of claims, parties and remedies is strongly encouraged*". [Emphasis added.] Joinder of pendent parties was obviously contemplated in *Gibbs.*

Manley next attempts to demonstrate that the Court of Appeals' decision is contrary to this Court's rulings in *Aldinger v. Howard,* supra, and *Owen Equipment & Erection Co. v. Kroger,* supra. This Court's decision in *Aldinger* at 427 U.S. 18 stated that ". . . we decide here only the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §§ 1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result." The *Aldinger* decision is in no way contrary to that of the Court of Appeals. In fact, *Aldinger* makes it abundantly clear that the federal courts must consider the specific statutory grant under which federal jurisdiction is asserted. As previously discussed, cases involving assertions of federal question jurisdiction are the most desirable for asserting jurisdiction over a "pendent party".

In *Owen Equipment & Erection Co. v. Kroger*, supra, this Court was presented with an attempt to erode the basic concept underlying federal diversity jurisdiction: complete diversity of the parties (e.g., *Strawbridge v. Curtiss*, 3 Cranch. 267, 2 L.Ed. 435 (1806); *Susquehanna & Wyoming Valley Railroad & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L.Ed. 179 (1871); *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941); *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951)). This Court refused to permit the plaintiff to proceed with her claim against a third-party defendant of the same citizenship as the plaintiff after the original defendant, who was of another citizenship, was dismissed from the case after impleading the third-party defendant. A contrary decision would have permitted a plaintiff to bring suit against a diverse defendant and simply wait for that defendant to implead any other defendants, regardless of citizenship. After the diverse defendant has been dismissed from the case, it would make a mockery of the requirements for federal jurisdiction to permit the plaintiff to continue the suit if only non-diverse defendants remain.

The claims asserted in *Owen* against the original and third-party defendants were in no way logically dependent upon each other. Each claim had its own separate factual basis. Unquestionably the plaintiff could, and almost certainly would, have been successful against one defendant and unsuccessful against the other because the claims asserted were mutually exclusive.

When the facts of this case are considered, it is obvious that *Owen* is readily distinguishable. Plaintiff's claim against Manley is almost wholly dependent on its claim against the City. Plaintiff's Complaint asserts that performance of its lease with Manley has been rendered impossible by the acts of the City and its agents (Appendix D Petition City of St. Louis, p. A-40). Unless Plaintiff can demonstrate that its leasehold interest has been taken by the City, it almost certainly cannot demonstrate impossibility of performance of its lease.

This factual pattern makes it apparent that there is but one constitutional "case" presented. As this Court said in *Aldinger* at 427 U.S. 8:

> 'Thus, in a federal question case, where the federal claim is of sufficient substance, and the factual relationship between 'that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case", pendent jurisdiction extends to the state claim."

Furthermore, without Manley as a Defendant the court would be unable to afford Plaintiff complete relief. If Plaintiff's action against the City succeeds and it is held that Plaintiff's leasehold interest has been taken, Plaintiff would still be liable to Manley for rent as it becomes due because the judgment could not operate against Manley. Plaintiff would then be forced to file a separate state action against Manley.

CONCLUSION

For the above reasons this Honorable Court should not issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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& SCHNEIDER

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APPENDIX

APPENDIX A

Exhibit C

REVISED CODE OF ST. LOUIS

Article XXI. Eminent Domain

Section 1. Initiation of Proceedings—Condemnation of (and) or damage to private property, real or personal, or any easement or use therein or restriction of the use thereof for public use, shall be effected as herein provided and as may be further provided by ordinance not inconsistent with this charter.

(a) Petition.—Upon the board of aldermen providing by ordinance recommended by the board of public service, (1) for the appropriation of any private property or any easement, use, right or interest therein, or (2) damage by reason of establishing or changing the established grade of any public street or alley or restriction of the use thereof, for any public use, or (3) for any public improvement or work which will damage private property, the city counselor, in the name of the city, shall apply promptly and in no event later than six months after such ordinance is effective to the circuit court of the eighth judicial circuit, or to any judge thereof in vacation by petition setting forth the general nature of the public use for which the property is to be appropriated, damaged or restricted, a description of the property and the estate or interest therein or restriction of the use thereof in each instance which the city seeks to appropriate, damage or impose, and praying the appointment of three disinterested commissioners to assess damages and benefits as hereinafter provided, to which petition the owners shall be made defendants by name, if known, and if known, by describing their claims and interests in such property and how derived by them.

(b) Parties defendant.—If the action affects the property of persons under guardianship, the guardians shall be made defend-

ants; if the property of married persons, their consorts shall be made defendants; if an estate or interest less than a fee, the persons having the next vested estate in remainder or reversion shall be made defendants or their interests will not be bound; but only persons in actual possession of and claiming title or who have record title appearing upon the proper records of the city to property affected, need be made defendants.

(c) Notice.—Notice of the filing of the petition, describing the property to be taken, damaged or restricted, shall be filed and recorded in the office of the recorder of deeds, otherwise purchasers of such property shall not be bound by the proceedings under the petition, provided that whenever the board of public service of said city shall by order designate the established grade of any street, boulevard, parkway, alley or other highway proposed in said ordinance to be opened, established or widened, damages and benefits, because of the establishment of such grade, may be ascertained and determined together with and in the same proceeding as the damages and benefits with respect to said opening, establishment or widening; in which case said established grade shall be set forth in the petition or in an amended petition.

(d) Resubmission of ordinance.—Where the improvement is a major highway or traffic artery, and is so designated in the ordinance, said ordinance may provide that in case the total damages, as finally determined by the court, to be awarded for property * * *

* * * * * * *

APPENDIX B

Exhibit D

MERCANTILE CENTER

A Redevelopment Project

by

Mercantile Center Redevelopment Corporation

October 19, 1972

Sverdrup & Parcel and Associates, Inc.

Supervising and Coordinating Architects-Engineers

Thompson, Ventulett & Stainback, Inc.

Master Plan & Design Architects

235 Peach Street N.E.

Suite 1900

Atlanta, Ga. 30303

* * * * * * *

O. **Proposed method of financing**

All of the land required for the construction of Phase I is owned in fee simple by Mercantile Development Corporation, a subsidiary of Mercantile Trust Company N.A., or by Mercantile Trust Company N.A. It is proposed that titles to the Phase I land will be transferred to Mercantile Center Redevelopment Corporation. This, together with the fact that Mercantile Trust Company N.A. will lease and occupy approximately 50% of the Phase I commercial building, removes Phase I of the project from the "speculative" category.

The developers of this project are currently engaged in other projects of this magnitude and are well versed in securing financing for this type of development.

Preliminary discussions have been held with major financial institutions regarding this project. Necessary financing can and will be finalized shortly after approval of this application.

No local, state or federal expenditures are involved.

Supplemental information:

It is proposed that Mercantile Center Redevelopment Corporation will lease real property to "Mercantile Center Associates, a joint venture under Joint Venture Agreement dated May 23, 1972," and Mercantile Center Associates will construct the buildings upon said leasehold. See V. Supplemental Information.

Note: The information supplied above is not offered because it relates to financing but to correct any possible misimpression created by the material previously submitted and to make clear the nature of the plan.